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No. 1214

In the Supreme Court of the United States

OCTOBER TERM, 1967

DONALD SMELTZ BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
FRED M. VINSON, Jr.,
Assistant Attorney General,
BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

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DONALD SMELTZ BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After waiving trial by jury, petitioner was convicted by the United States District Court for the Northern District of Ohio of refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 456, 462. He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 16a).

Petitioner's sole defense at trial was that the Universal Military Training and Service Act was unconstitutional because conscription was not necessary in order to maintain the strength of the Armed Forces needed at the time of his induction. The district court refused petitioner's request to subpoena the Secre-

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tary of Defense and to introduce other evidence which he claimed would show that the Congressional purpose to provide for the common defense could have been accomplished by voluntary recruitment if increased pay and opportunities for training had been offered as incentives for enlistment (Pet. 6–8).

The court below properly held that petitioner was not entitled to present such evidence at the trial. Both methods of raising and supporting armies—by conscription or by volunteers, in peacetime and in war—are constitutional. *Selective Draft Law Cases,* 245 U.S. 366; *Richter* v. *United States,* 181 F. 2d 591, 593 (C.A. 9); *Bertelson* v. *Cooney,* 213 F. 2d 275 (C.A. 5), certiorari denied, 348 U.S. 856. The desirability of maintaining a military draft together with a volunteer military service is a matter for legislative judgment, and in fact has received careful legislative study. A "wide latitude of discretion must be accorded" "Congress in the exercise of its powers", and "every reasonable intendment must be made in favor of [the] continuing validity" of the congressional determination. *Hamilton* v. *Kentucky Distilleries Company,* 251 U.S. 146, 163; see *Coleman* v. *Miller,* 307 U.S. 433, 453–454. Even assuming that the draft law might be unconstitutional if the legislation had no rational basis in fact, the evidence offered by petitioner, by his own characterization, fell far short of meeting that burden.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys.

APRIL 1968.